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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

8 MORRIS DELBERT O'DELL,

9 Petitioner,

10 v.

11 GORDON KARLSSON,

12 Respondent.

Case No. C10-1405-MJP-JPD

REPORT AND RECOMMENDATION

13 INTRODUCTION AND SUMMARY CONCLUSION

14 Petitioner Morris O'Dell is currently in the custody of the Washington Department of
15 Corrections pursuant to a 2003 judgment and sentence of the King County Superior Court. He
16 has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from that
17 judgment. Respondent has filed an answer to the petition in which he argues that the petition is
18 time-barred under the federal statute of limitations, 28 U.S.C. § 2244(d). This Court, having
19 reviewed petitioner's petition, respondent's answer, and the balance of the record, concludes that
20 petitioner's federal habeas petition should be dismissed as untimely.

21 PROCEDURAL HISTORY

22 On September 11, 2003, petitioner was found guilty, following a jury trial, of one count
23 of child molestation in the third degree, one count of attempted child molestation, and fifteen

counts of communication with a minor for immoral purposes. (*See* Dkt. No. 26, Exs. 1 and 2.) On October 31, 2003, petitioner was sentenced to a total term of 47 months confinement. (Dkt. No. 26, Ex. 1 at 3.) Petitioner appealed his convictions to the Washington Court of Appeals and, on March 7, 2005, the Washington Court of Appeals issued an unpublished opinion affirming the convictions. (*See id.*, Ex. 2.) Petitioner thereafter sought discretionary review in the Washington Supreme Court, and the Supreme Court denied review without comment on November 29, 2005. (*See id.*, Exs. 7 and 8.) The Washington Court of Appeals issued its mandate terminating direct review on January 13, 2006. (*Id.*, Ex. 9.)

On October 15, 2007, petitioner filed a motion in the King County Superior Court to vacate his sentence. (*Id.*, Ex. 10.) The Superior Court subsequently transferred the motion to the Washington Court of Appeals for consideration as a personal restraint petition. (*Id.*, Ex. 11.) On January 14, 2008, the Washington Court of Appeals issued an order dismissing the petition on the grounds that petitioner was attempting to re-litigate issues which had previously been rejected on direct appeal. (*Id.*, Ex. 12.) The Court of Appeals issued a certificate of finality in petitioner's personal restraint proceedings on March 19, 2008. (*Id.*, Ex. 13.)

Petitioner now seeks federal habeas review of his convictions. Petitioner signed his federal habeas petition on August 28, 2010, and the petition was received by the Court for filing on August 31, 2010. (*See* Dkt. No. 6.)

DISCUSSION

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Sec. 105 (1996), which worked substantial changes in the law of federal post-conviction relief. One of those changes was to adopt a one-year statute of limitations for actions filed pursuant to § 2254. *See* 28 U.S.C.

1 § 2244(d)(1). The one year limitations period starts to run from the date of the conclusion of
2 direct review or “the expiration of the time for seeking such [direct] review,” whichever is
3 longer. 28 U.S.C. § 2244(d)(1)(A).

4 In this case, the period for direct review ended, at the latest, upon the expiration of the
5 period for filing a petition for writ of certiorari with the United States Supreme Court. *See*
6 *Bowen v. Roe* 188 F.3d 1157, 1158-59 (9th Cir. 1999). The Washington Supreme Court denied
7 petitioner’s petition for review on direct appeal on November 29, 2005. Petitioner had 90 days
8 after the entry of that ruling (as opposed to the issuance of the state mandate), or until
9 approximately February 27, 2006, to file a petition for a writ of certiorari in the United States
10 Supreme Court. *See* Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States.
11 Because petitioner did not file a petition for certiorari, his conviction became final on or about
12 February 27, 2006. 28 U.S.C. § 2244(d)(1)(A). Petitioner’s one year statute of limitations began
13 to run on the following day. *See Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002).

14 The one year limitations period is tolled for any “properly filed” collateral state challenge
15 to the state conviction. 28 U.S.C. § 2244(d)(2). While petitioner did file a collateral state
16 challenge to his judgment and sentence, that challenge was not filed until October 15, 2007, well
17 after the statute of limitations expired on February 28, 2007. Petitioner’s personal restraint
18 proceedings in the state courts therefore would not have acted to toll the statute of limitations.
19 *Laws v. Lamarque*, 351 F.3d 919, 922 (9th Cir. 2003).

20 The Ninth Circuit has determined that the statute of limitations governing federal habeas
21 petitions is also subject to equitable tolling. *Id.* However, the Ninth Circuit has made clear that
22 equitable tolling is available “only when extraordinary circumstances beyond a prisoner’s control
23 make it impossible to file a petition on time and the extraordinary circumstances were the cause

1 of his untimeliness.” *Laws v. Lamarque*, 351 F.3d at 922 (internal quotation and citation
2 omitted). Petitioner makes no showing that he is entitled to equitable tolling of the federal
3 statute of limitations.

4 As noted above, petitioner signed his federal habeas petition on August 28, 2010, three
5 and a half years after the statute of limitations expired on February 28, 2007. Because petitioner
6 filed his petition outside of the § 2254 statute of limitations period, and because petitioner has
7 not demonstrated that he is entitled to any tolling of the limitations period, his petition is time-
8 barred.

9 Certificate of Appealability

10 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's
11 dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA)
12 from a district or circuit judge. A certificate of appealability may issue only where a petitioner
13 has made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C.
14 § 2253(c)(3). A petitioner satisfies this standard “by demonstrating that jurists of reason could
15 disagree with the district court's resolution of his constitutional claims or that jurists could
16 conclude the issues presented are adequate to deserve encouragement to proceed further.”
17 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that
18 petitioner is not entitled to a certificate of appealability in this action.

19 CONCLUSION

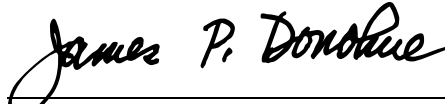
20 For the reasons set forth above, this Court recommends that petitioner’s petition for writ
21 of habeas corpus be dismissed, with prejudice, pursuant to 28 U.S.C. § 2244(d). This Court

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1 further recommends that a certificate of appealability be denied. A proposed order accompanies
2 this Report and Recommendation.

3 DATED this 8th day of April, 2011.

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5 JAMES P. DONOHUE
6 United States Magistrate Judge
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